

Myers v Huang

2015 NY Slip Op 30744(U)

May 4, 2015

Supreme Court, New York County

Docket Number: 805366/2012

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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EILEEN C. MYERS,

Plaintiff,

-against-

Index No. 805366/2012

Decision and Order

JAMES HUANG, M.D., VINCENT MILLER, M.D.,
EFSEVIA WAKIANI, M.D., Ph.D., MAUREEN
ZAKOWSKI, M.D., ZHAOHAI YANG, M.D., AGNES
COLANTA, M.D., DAVID S. KLIMSTRA, M.D., "JOHN
DOE" and "JANE DOE" (intended to be the physicians (if
not the above named physicians) who misdiagnosed
plaintiff's cancer as being lung cancer rather than breast
cancer), and MEMORIAL SLOAN-KETTERING
CANCER CENTER d/b/a MEMORIAL HOSPITAL,

Defendants.

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JOAN B. LOBIS, J.S.C.:

By this Order to Show Cause defendant Maureen Zakowski, M.D., seeks a protective order pursuant to Section 3103 of the Civil Practice Law and Rules (CPLR) against the plaintiff's request for the deposition of her. Plaintiff Eileen C. Myers cross-moves under CPLR § 3124 for an order compelling the defendant to appear for an examination before trial. For the reasons stated below the motion is granted and the cross-motion is denied.

The plaintiff has commenced this medical malpractice action to recover damages resulting from the failure of defendants to properly diagnose her recurrence of breast cancer. The movant, Dr. Zakowski, negligently interpreted a pathology specimen taken during surgery to remove the lower lobe of Ms. Myer's right lung on March 24, 2010. In a report dated April 2, 2010, Dr. Zakowski interpreted the specimen as poorly differentiated non-small cell carcinoma. After undergoing adjuvant chemotherapy and a liver biopsy on June 17, 2011, it was determined

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that the lung lesion was metastatic breast cancer. In Dr. Zakowski's amended answer, she admitted that she departed from the standard of care. She asserts that her only involvement with the patient was to look at the specimen and identify what she saw in 2010. She had no other involvement in the treatment and care of the patient. In this context defendant seeks a protective order arguing that the only question left for the jury is damages. She asserts that her deposition cannot lead to any relevant evidence on the issue of plaintiff's damages.

In opposition to the motion and in support of the cross-motion, plaintiff argues that the deposition is essential to the prosecution of the case on issues of liability, causation and damages, claiming Dr. Zakowski's misread was "but one step in a cascade of interconnected negligent missteps made by co-Defendants." The plaintiff argues that CPLR § 3101(a) has always been interpreted to allow liberal discovery. What is permissible discovery is left to the discretion of the Court to prevent "unreasonable annoyance, expensive, embarrassment, disadvantage or other prejudice. CPLR § 3103(a); MSC Inc. v. Jacob, 120 A.D.2d 1072 (1st Dep't 2014). Plaintiff points out that Dr. Zakowski's amended answer does not eliminate all areas of inquiry since she has not described what conduct she is admitting. Plaintiff claims that without a deposition she cannot prove that Dr. Zakowski's conduct was reckless. She maintains that a deposition is necessary because Dr. Zakowski has not withdrawn her affirmative defenses of Article 16 and plaintiff's culpable conduct. The plaintiff asserts that she would also be entitled to explore the relationship Dr. Zakowski has with her employer, co-defendant Memorial Sloan Kettering Cancer Center¹ (Memorial).

¹ Memorial Sloan Kettering Cancer Center was sued here as "MEMORIAL SLOAN-KETTERING CANCER CENTER d/b/a MEMORIAL HOSPITAL."

In opposition to the cross-motion and in reply to the opposition to the motion, defendant argues the plaintiff has not established that any relevant evidence could be obtained from Dr. Zakowski. The defendant is willing to withdraw her Article 16 affirmative defense and the defense of culpable conduct. Memorial concedes it is vicariously liable for Dr. Zakowski. She argues that the inclusion of the word reckless in the cause of action for medical malpractice does not require the deposition. Her admission of departure is a concession of liability. The only evidence plaintiff needs to have the jury hear would not be evidence she can provide. Defendant points out that plaintiff has already deposed Dr. Huang, the thoracic surgeon; Dr. Vincent Miller, the oncologist; and four hospital employees who could testify about hospital procedure. The defendant has no testimony to offer that would not have been obtained. Furthermore, the plaintiff has already had the actual pathology materials reviewed by her own expert.

The court is persuaded from the role Dr. Zakowski played and her admission of liability that there is no permissible reason to require her to be deposed. Although she did play a pivotal role in the misdiagnosis of lung cancer, she had no ongoing role treating plaintiff. Once she has made the admission of liability, the plaintiff can proceed to proof of damage. As a result of the concession of vicarious liability by Memorial and the withdrawal of the affirmative defense of Article 16 and culpable conduct of plaintiff, plaintiff would be able to enter judgment for the full amount and proceed to enforce the judgment against both defendants. Plaintiff has every right to continue her claims against the other defendants but she has not established how Dr. Zakowski's deposition would aid her in that task. Finally, the Court would not want to discourage defendants from admitting liability. Once the admission is made a doctor would anticipate his or her active

role in the trial would be over. Allowing discovery to continue against a defendant in the shoes of Dr. Zakowski could be a disincentive to similar admissions.

The motion for a protective order against the deposition of Dr. Zakowski is granted and the cross-motion to compel the deposition is denied. This constitutes the decision and order of this Court.

Dated: *May 4*, 2015

ENTER:



JOAN B. LOBIS, J.S.C.